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IN THE

Supreme Court of the United States

October Term, 1959

No. 538

UNITED STEELWORKERS OF AMERICA,
Petitioner,

v.

ENTERPRISE WHEEL AND CAR CORPORATION.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR THE RESPONDENT ENTERPRISE WHEEL AND CAR CORPORATION

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TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED	1
STATUTE INVOLVED	3
STATEMENT	3
SUMMARY OF ARGUMENT	14
ARGUMENT	20
I. Inquiry By The Court Was Proper To Determine Whether The Arbitrator Had Exceeded His Authority Vested In Him Under The Terms Of The Collective Bargaining Contract And Such Action Was Entirely Consistent With The National Labor Policy	20
II. The Arbitrator Exceeded His Authority In Allowing Back Pay And Reinstatement Beyond The Contract Termination Date And The Fourth Circuit Did Not Err In Holding That Portion Of The Award Invalid	31
A. The arbitrator exceeded the authority vested in him by the contract	32
B. The precedents upon which the Court of Appeals relied are applicable to the case at bar	43

Page

III. The Decision Of The Court Of Appeals Does Not Conflict With The Decision Of The N.L.R.B. In Local No. 611, International Chemical Workers, And The Sixth Circuit Decision In N.L.R.B. v. Knight Morley Corporation, On Which Such Board Ruling Was Based, Or With The Policies Of The Federal Labor Laws 52

IV. The Reasoning Of The Court Of Appeals Is Not Inconsistent With The Decision Of This Court In Vitarelli v. Seaton 59

CONCLUSION 63

TABLE OF CITATIONS

CASES

Amazon Cotton Mill Co. v. Textile Workers Union, 167 F.2d 183 (CCA 4, 1948) 42

Application of States Marine Corp. of Delaware, 127 F.Supp. 943 (DC N.Y. 1954) 27

Arlington Towers Corp. v. John McShain, 150 F.Supp. 904 (DC D.C. 1956) 16, 26, 28

In Re Armour & Co. and United Packing House Workers of Local 15, 11 L.A. 600 (1948) 50, 52

Association of Westinghouse Salaried Employees v. Westinghouse Electric Corporation, 348 U.S. 437 (1955) 11

Atchison T. & S.F.R. Co. v. Andrew, 211 F.2d 211 (CA 10, 1954) 12

Burchell v. Marsh, 17 How. 344 (1855) 28

Cardenas v. Wilson & Co., 180 F.2d 828 (CA 10, 1950) 36

Elder v. N.Y.C. Ry. Co., 152 F.2d 361 (CA 6, 1945) 36

Page

Eubanks v. Galveston, H. & S. A. Ry. Co., 59 S.W. 2d 825 (Tex. Com. App. 1933) 46

Item Company v. New Orleans Newspaper Guild, 256 F.2d 855 (CA 5, 1958) 42, 43

Lane v. Endicott-Johnson, 80 N.Y.S. 2d 639 (1948) 42, 43

Lewis v. Benedict Coal Corp., 80 S.Ct. 489 (1958) 23

Local No. 611, International Chemical Workers, 123 N.L.R.B. No. 182 (1959) 18, 52, 53, 54

Lodge No. 12 IAM v. Cameron Iron Works, 257 F.2d 467 (CA 5, 1958) 51

Meadows v. Radio Industries, 222 F.2d 347 (CA 7, 1955) 12

N.L.R.B. v. Highland Shoe Co., 119 F.2d 218 (CCA 1, 1941) 55

N.L.R.B. v. Knight Morley Corp., 251 F.2d 753 (CA 6, 1958) 18, 53, 54, 55

N.L.R.B. v. Reed & Prince Mfg. Co., 118 F.2d 874 (CCA 1, 1941) 55

N.L.R.B. v. Standard Coil Products Co., 224 F.2d 465 (CA 5, 1955) 41

N.L.R.B. v. Victor Metal Products Corp., 106 NLRB 1361 (1935) 47, 49

Odell v. Humble Oil & Refining Co., 201 F.2d 123 (CA 10, 1953) 33, 35, 44, 46

In Re Roto Supply Sales Co., 28 L.A. 657 (N.Y. Sup.Ct. 1957) 51

Service v. Dulles, 354 U.S. 363, 77 S.Ct. 1152 (1957) 60

Page

Shiels v. Baltimore and Ohio Railroad Co., 154 F.Supp. 917 (DC Ind. 1957) 36

Simmons v. Simmons, 85 W.Va. 25, 100 S.E. 743 (1919) 27

System Federation No. 59 of Railway Employees v. Louisiana & A. Ry. Co., 30 F.Supp. 909 (DC La. 1940) 37

System Federation No. 59 of Railway Employees v. Louisiana & A. Ry. Co., 119 F.2d 509 (CCA 5, 1941) 17, 36, 41, 44

Texoma Natural Gas Co. v. Oil Workers International Union, Local 463, 58 F.Supp. 132 (DC Tex. 1943) 26, 27

Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957) 13, 14, 19, 21, 56

Timken Roller Bearing Co. v. N.L.R.B., 161 F.2d 949 (CCA 6, 1947) 53, 54, 55

United Protective Workers Local No. 2 v. Ford Motor Co., 223 F.2d 49 (CA 7, 1955) 12, 17, 33, 44, 45, 46

U.S. v. Farragut, 22 Wall. 406 (1874) 16, 26, 29

United States Steel Corporation v. Nichols, 229 F.2d 396 (CA 6, 1956) 41

Vitarelli v. Seaton, 359 U.S. 535, 79 S.Ct. 968 (1959) 20, 59, 60, 61

Walker v. Pennsylvania-Reading Seashore Lines, 142 N.J. Eq. 588, 61 A.2d 453 (N.J. 1948) 36

Warden v. Hinds, 163 F. 201 (CCA 4, 1908) 12

Page

Western Union Division, Commercial Telegraphers, Commercial Telegraphers Union v. Western Union Telegraph Co., 83 NLRB 238 (1949) 47, 48

STATUTES

Labor Management Relations Act of 1947, Section 301 (a), 61 Stat. 156, 29 U.S.C. Sec. 185(a) 2, 4

LEGISLATIVE MATERIAL

Conf. Rep. No. 510, 80th Cong., 1st Sess. 42 (1947) 20

TEXTS AND MISCELLANEOUS

American Law Institute Restatement, *Agency*, Sec. 442 12

3 Am. Jur., *Arbitration and Award*, Sec. 41 27

12 Am. Jur., *Contracts*, Sec. 228 26

35 Am. Jur., *Master & Servant*, Sec. 19 12

Cox, *Reflections Upon Labor Arbitration*, 72 Harv.L.Rev. 1482 (1959) 14, 16, 21, 25, 30, 31

Cox, *The Legal Nature of Collective Bargaining Agreements*, 57 Mich.L.Rev. 1 (1958) 23, 24

Shulman, *Reason, Contract, and Law in Labor Relations*, 68 Harv.L.Rev. 999 (1955) 20

Wellington, *Judge Magruder And The Labor Contract*, 72 Harv.L.Rev. 1268 (1959) 21

Williston On Contracts (1937 ed.) Sec. 1359, p. 3815 32

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OPINIONS BELOW

The citations for the opinions below have been presented in the Brief for the Petitioner.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Brief for the Petitioner.

QUESTIONS PRESENTED

The United Steelworkers of America (hereinafter called the Union) requested arbitration when eleven employees were terminated on January 18, 1957, while working under the terms of a collective bar-

gaining contract between the Union and Enterprise Wheel and Car Corporation (hereinafter referred to as the Company or as Enterprise). The Company denied that a grievance subject to arbitration existed. The collective bargaining contract of one year's duration expired on April 4, 1957, and was not renewed nor was it succeeded by any subsequent agreement between the parties. Four months after the expiration of the contract the Union sued in District Court for specific performance of the contract, alleging jurisdiction under Section 301 (a) of the Labor Management Relations Act of 1947. Resort to the arbitration provisions of the contract were ordered and compliance was had.

The arbitrator on April 10, 1958, determined that while the employees were guilty of improper conduct, discharge was too severe. It was his decision that they should be reinstated with back pay running from date of discharge, beyond the contract termination date until reinstated, less credit to the Company for a disciplinary suspension period of ten days and less further undetermined amounts the men had received from other employment. The District Court ordered compliance with the decision and award of the arbitrator. The Court of Appeals modified the judgment below. It held that the award was invalid insofar as it ordered reinstatement and back pay beyond the termination date of the contract because the arbitrator had exceeded his authority under the contract. That Court also determined that the award was incomplete and ordered further arbitration as to the amounts earned or which should with diligence have been earned in other employment by the grievants until the date of expiration of the contract.

The Company disagrees with the Union's statement of the "Questions Presented" (Petitioner's Brief, 4) on the ground that such statements beg the issues sought to be raised. When fairly stated, the questions are as follows:

1. Was it proper for the Court of Appeals to consider whether or not the award exceeded the scope of the arbitrator's authority under the contract?

2. Was that portion of the award of the arbitrator ordering reinstatement and back pay for the period after the termination date of the contract invalid by reason of being in excess of the power and authority vested in the arbitrator under the terms, provisions and limitations of the contract entered into on April 5, 1956 and expiring on April 4, 1957?

STATUTE INVOLVED

The pertinent statute, Sec. 301(a) of the Labor Management Relations Act, 1947, 61 Stat. 156, 29 U.S.C. Sec. 185(a) is set forth in the Brief for the Petitioner at page 5.

STATEMENT

On April 5, 1956, Enterprise Wheel and Car Corporation and United Steelworkers of America entered into a collective bargaining agreement to be in force from April 5, 1956, only until midnight on April 4, 1957 (Ent.R. 1a-18).[1] Section 1 of Article III of

[1] Inasmuch as the Petitioner Union has consolidated its brief in cases Nos. 360, 443 and 538, the same method of record reference will be used as that explained and followed in the Union's brief at page 2, footnote 3. Reference to the record in this case will be preceded by the legend "Ent.R.".

the contract regarding the adjustment of grievances provided for a four-step procedure. In the event a disputed grievance could not be settled by the three-step preliminary procedure, then as the fourth step arbitration could be requested. The portions of Article III pertinent to this discussion follow:

> "Section 1. Should differences arise between the Company and the Union, or its members employed by the Company, as to the meaning and application of the provisions of this Agreement, an earnest effort shall be made to settle such differences immediately, in the following manner:
>
> "Step 1. * * *.
>
> "Step 2. * * *.
>
> "Step 3. * * *.
>
> "Step 4. In the event that the dispute shall not have been satisfactorily settled in accordance with the above, it shall be submitted, at the request of either party, to a panel of three (3) members, one of whom shall be appointed by the Union, one by the Company, and the third member, who shall be an impartial umpire, shall be selected by mutual agreement of the parties. The expenses and salary incident to the services of the umpire shall be paid jointly by the Union and the Company. In the event that a mutually agreeable umpire cannot be selected within ten (10) days after date of notice of desire to appeal to 4th step grievance, either party may request the Federal Mediation and Conciliation Service to furnish the Company and the Union with a list of five (5) qualified and disinterested arbiters. The Com-

pany and the Union shall each reject two of the names thus submitted and the remaining person (or either of the remaining persons) shall be the third member of the panel. The decision of the umpire shall be final and binding on the parties." (Ent.R. 1a-16).

Article VIII of the contract recognized that the right to manage the plant and works and to direct the working forces was exclusively with the Company. However, Article IV, Section 1 limited this managerial right in the following manner:

"In the exercise of its rights and duties as set forth in ARTICLE VIII, Management agrees that a member of the Union shall not be peremptorily discharged from and after the date hereof, but that in all instances in which Management may conclude that an employee's conduct, may justify suspension or discharge, he shall be first suspended. Such initial suspension shall be for not more than five (5) work days. During this period of initial suspension the employee may, if he believes he has been unjustly dealt with, request a hearing and a statement of the offense before the Plant Manager with a member or members of the Grievance Committee present as he may choose. At such hearing, all the facts concerning the case shall be made available to both parties. After such hearing, Management shall conclude whether to convert the suspension into discharge, or extend, sustain, or revoke the suspension. If the suspension is revoked the employee shall be returned to employment and receive full compensation at his regular rate of pay for the time lost. If the suspension is sustained, extended, or converted into discharge, the employee may at any time within five (5) work-

ing days from the filing of Management's decision, allege and present a grievance to be handled in accordance with the procedure of ARTICLE III.

Should it be determined by the Company or by an arbitrator in accordance with the grievance procedure that the employee has been suspended unjustly or discharged in violation of the provisions of this Agreement the Company shall reinstate the employee and pay full compensation at the employee's regular rate of pay for the time lost." (Ent.R. 1a-17, 18).

On January 18, 1957, the employment of eleven plant employees was terminated because they walked off their jobs by reason of the dispute of another employee with the Company. (Ent.R. 2a-19). At that time the Company had fifty-two employees within the bargaining unit. (Ent.R. 2a-19). The dispute of the fellow employee was forgotten, but the Union claimed that the eleven men who had been terminated had a grievance in accordance with the provision of the contract. The Company denied that a grievance existed, insisting that the men had quit, and refused to reemploy them. (Ent.R. 2a-20, 21). The answer of the Company refusing the reemployment was taken to be the result which would normally have been obtained in the third step of the grievance procedure outlined in Section 1 of Article III of the contract. The next step in such procedure, or Step 4, provided for arbitration procedure. It was the position of the Company that there was no arbitrable issue involved (Ent.R. 2a-9, 12). However, the Company decided in view of an agreement worked out with the Union, to arbitrate the issue under the procedure provided for in the contract at a

hearing set for April 6, 1957. (Ent.R. 2a-9). When the Union failed to carry out the agreement, the Company, on April 6, 1957, refused to arbitrate (Ent.R. 2a-9).

A charge of unfair labor practice was filed by the Union before the National Labor Relations Board on July 3, 1957. (Ent.R. 2a-10; also opinion of Court of Appeals, Ent.R. 43). The charge before the Board alleged a failure to collectively bargain and a violation of Section 8 (a) 3 of the National Labor Relations Act by reason of discrimination against the eleven men previously mentioned who had claimed that they were wrongfully discharged. The Board refused to issue a complaint and the charge was dismissed on August 12, 1957. (Ent.R. 2a-10).

Finally, on August 22, 1957, over four months after the collective bargaining contract had expired, the Union instituted an action in the United States District Court for the Southern District of West Virginia seeking specific performance of the labor contract, particularly the arbitration procedure of ARTICLE III, Section 1, Step 4 of the contract. (Ent.R. 2a-3; also opinion of Court of Appeals, Ent.R. 43).

The District Court ordered specific performance and pursuant to the Court's order the grievance was submitted, under the terms of the contract, to Milton H. Schmidt, for arbitration, the parties agreeing to have only one umpire or arbitrator. (Ent.R. 2a-17). Hearing was held before him on January 3, 1958. (Ent.R. 2a-27). On April 10, 1958, he rendered what he denominated his "Decision and Award of the Arbitrator." His award is now set out:

"AWARD

The grievance is allowed as follows:

1. The discharge of each of the grievants which occurred on January 18, 1957, is set aside and reduced to a disciplinary penalty of ten days suspension for each of the grievants. The ten day period is to be calculated from January 18, 1957.

2. The Company shall reinstate each of the grievants who desire reinstatement to the status of employees with their classifications and seniority status as of the date of their discharge, January 18, 1957.

3. The Company shall reimburse the grievants for all time actually lost from work which they would otherwise have had from the Company at the regular rate of pay for each grievant, less the ten day suspension period and less such amounts as each has received for other employment since ten days after January 18, 1957.

/s/ Milton H. Schmidt

April 10, 1958" (Ent.R. 2a-23, 24).

As we have noted above, the controlling contract which outlined the arbitration procedure to be followed had expired and terminated on April 4, 1957. After that date all of the employees of the defendant who continued to work were without any contract whatsoever and the terms, conditions and rights of the terminated contract were not extended or renewed to embrace the period after April 4, 1957. (Ent.R. 1a-20; also admission of Union's Counsel, Ent.R. 1a-22). Nevertheless, the award of the arbitrator granted reinstatement of the grievants and

also back pay beyond the contract termination date at regular rates, less certain credits for a disciplinary suspension of ten days and less amounts received from other employment. No date was set upon which the reinstatement was to occur, nor was any finding made as to amounts secured in other employment. Neither was a formula provided for determining how amounts received from other employment were to be set off against the amount of money actually lost by reason of the grievants not working. Enterprise immediately asserted the award to be invalid. Yet this notwithstanding, after the award was made, Enterprise while refusing to reinstate the grievants, did offer to pay them, subject to offsets for earnings in other employment, at their regular rate of pay from the end of the ten day suspension period to April 4, 1957, the expiration date of the contract. This offer was refused. (Ent.R. 1a-21; 2a-39).

Then much later, on November 25, 1958, the Union filed a motion for Enterprise to show cause why it had not complied with the decision and award of the arbitrator, and also asked; if no good cause be shown, for aid in enforcement of the order of the District Court of October 21, 1957, requiring resort to the arbitration procedure of the contract.

Enterprise filed its answer and resistance to the motion to show cause, alleging that the District Court lacked jurisdiction for the reason that the plaintiff Union was seeking to enforce an arbitration award personal to individual grievants and that the original action ordering arbitration had been finalized when the grievance was submitted, the motion to show cause actually being a new action to enforce the award of the arbitrator. In the alternative, to the merits of the

matter, Enterprise asserted that the award was invalid and void because (a) the arbitrator had exceeded the powers vested in him under the terms and limitations of the collective bargaining contract; (b) that the arbitrator had so imperfectly executed his duties that a final and definite award had not been made; and (c) that the award was not in accordance with law. (Ent.R. 2a-26, 27).

Defendant Enterprise further asserted that the collective bargaining contract entered into on April 5, 1956, for one year, had expired on April 4, 1957 and that after the expiration date no contract whatsoever was in effect and the contract had not been extended or renewed in any way. (Ent.R. 2a-28). The affidavit of Oscar Kraehenbuehl, president of the Company, was filed in support of the answer and resistance of the defendant. (Ent.R. 1a-20).

The motion to show cause was heard on December 11, 1958. (Ent.R. 2a-29). The Court ordered the defendant to show cause, to which action the defendant objected on the grounds of lack of jurisdiction, as asserted in its answer and resistance. Without waiver of objections as to jurisdiction, it was ordered that defendant's answer and resistance to the motion to show cause and the affidavit of Oscar Kraehenbuehl in support thereof be treated as the answer of the defendant, Enterprise, to the Court's order to show cause. The matter was then submitted on plaintiff's motion to show cause, the order of the Court for defendant to show cause in conformity with said motion, the defendant's answer and resistance thereto, the affidavit of Oscar Kraehenbuehl in support of the answer and resistance, and the facts agreed by the parties as shown in the pleadings, exhibits and ad-

missions at the hearing. (Ent.R. 2a-29, 30). No testimony of witnesses was taken.

The District Court then held that the defendant Company had failed to show cause for its noncompliance with the decision and award of the arbitrator and rendered judgment on December 16, 1958, ordering forthwith compliance. To all of this defendant objected. (Ent.R. 1a-1, 2).

Timely appeal was taken from this judgment to the United States Court of Appeals for the Fourth Circuit. The questions on appeal presented by the Company were identical to those raised before the District Court.

The Court of Appeals rejected the Company's contention that the District Court lacked jurisdiction over the subject matter of the suit because it was brought by the Union to enforce the personal rights of individual employees. The argument on this point was held not tenable under the decision in *Association of Westinghouse Salaried Employees v. Westinghouse Electric Corporation*, 348 U.S. 437 (1955).

However, the Court determined that the award of the arbitrator exceeded the power vested in him and went beyond the scope of the arbitration agreement in ordering reinstatement and in ordering back pay for the period after the termination date of the contract. The Court concluded, on the basis of well settled authority, that

> "* * * collective bargaining agreements do not create a permanent status or condition, or give an indefinite tenure, or extend rights created and arising under the contract beyond

its life, but that these rights remain in force only for the life of the contract unless renewed by subsequent contract or preserved by statute." (Opinion of Court of Appeals, Ent.R. 46).

In scrutinizing the contract the Court said:

"The rights which the employees derived from the 1956-57 labor contract are not open to doubt. While it was in effect they could not be discharged without cause, but after it had expired their hiring was merely for an indefinite period which created an employment that either party might terminate at any time. *Meadows v. Radio Industries*, 7 Cir., 222 F.2d 347, 349; *Atchison T. & S. F. R. Co. v. Andrew*, 10 Cir., 211 F.2d 264, 265; *Warden v. Hinds*, 4 Cir., 163 F. 201; 35 Am. Jur., *Master & Servant*, Sec. 19 (pp. 457-58); American Law Institute Restatement, *Agency*, Sec. 442. The same principle is applied where a contract of employment contains a provision allowing termination after a period of notice has been given. In such cases damages for wrongful discharge are limited to the notice period since at the expiration of the period the right of the employer to discharge the employee is unrestricted. See *United Protective Workers v. Ford Motor Co.*, 7 Cir., 223 F. 2d 49, 52; *Odell v. Humble Oil & Refining Co.*, 10 Cir., 201 F.2d 123, 128, cert. den. 345 U. S. 941. It follows that in the pending case the discharged men had no right to damages for loss of time under the contract after its expiration and that the award should be amended so as to eliminate damages based on the subsequent period. This can easily be done without invalidating the entire award." (Opinion of Court of Appeals, Ent.R. 46).

The Court, citing decisions of the Supreme Court, pointed out that the prevailing view is that even if the award exceeds the scope of the arbitration agreement it is not invalid in toto but only so far as it is excessive, if it is of such character that a court can separate the part within from the part beyond the submission. (Opinion of Court of Appeals, Ent.R. 44, 45). In accordance with this concept the valid portion of the award was allowed to stand and the judgment of the District Court was modified so as to admit the requirement that the Company comply with the award of the arbitrator insofar as the award required the reinstatement of the discharged employees and the recovery of wages for loss of time was limited to the period of the contract.

The Court also found that the award was incomplete and indefinite because the arbitrator failed to include in the award the amounts which had actually been earned or by the exercise of due diligence could have been earned by the grievants in other employment. The Court showed that it has generally been held that a final award must be certain in its terms or provide means and data by which it may be made certain by mathematical calculation and that if it is deficient in this respect it must be vacated since the the powers of the arbitrator are exhausted and the award cannot be resubmitted to him for correction or amendment. Nevertheless, it was felt that the rule forbidding the resubmission should not be applied in the settlement of employer-employee disputes. In consonance with the Supreme Court's direction in *Textile Workers Union v. Lincoln Mills*, 353 U. S. 448 (1957) that the federal courts fashion a federal substantive law in accordance with the national policy

favoring arbitration, the Court ordered that the parties complete the arbitration so that the amounts due the grievants for loss of time could be definitely ascertained. (Opinion of the Court of Appeals, Ent.R. 47, 48).

The Union filed a petition for rehearing which was denied. On January 11, 1960 this Court granted certiorari. The Union does not here question the action of the Court of Appeals in ordering that the arbitration be completed so that the amounts earned or which should have by due diligence been earned by the grievants might be definitely ascertained. In the words of counsel for the Union, "The only questions presented by the union's petition for certiorari relate to the action of the court of appeals in reversing the district court's order with respect to reinstatement and back pay subsequent to the termination of the agreement." (Petitioner's Brief, 20).

SUMMARY OF ARGUMENT

I. Section 301 of the Labor Management Relations Act provides legal sanction for collective bargaining agreements. Judicial enforceability of the rights and duties under labor contracts is very much with us and no one would suppose that time will reverse this policy. Whether the result is good or bad, the national policy has brought the courts into grievance arbitration so that "When a motion is filed to compel or stay arbitration or to enforce or vacate an award, the court becomes a superior tribunal and the arbitrator can make only such adjudication as the court permits." Cox, *Reflections Upon Labor Arbitration*, 72 Harv. L. Rev. 1482, 1487 (1959); also see *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448 (1957).

Admittedly, the collective bargaining agreement has characteristics unique to it alone, and salutary effects are to be obtained from having an arbitrator apply an industrial jurisprudence in processing disputes under labor agreements. But there is no reason to jettison wisely developed principles of justice that are as relevant to the enforcement of collective bargaining contracts as they are to contracts concerning other matters. Many contract rules work well in the labor environment. The solution is not the wholesale discarding of the accumulated wisdom of contract law, as some, who deplore any court interference, advocate. Instead, there must be a process of synthesis directed toward the avoidance of inapposite principles.

Although the nature of collective bargaining may call for an arbitrator to apply industrial jurisprudence without hindrance of the literal meaning of contract wording, it is clear that there are definite limits to the arbitrator's function. The limitation imposed will be revealed by the peculiarity of each situation. For example, the phrasing of the arbitration clause itself is important. A narrow clause, similar to the one involved in this case, limited to "interpretation and application" embodies restrictions not present in the more "wide-open" clause referring to "any dispute, difference, disagreement or controversy of any nature or character." Thus, the "imperative which requires a body of 'industrial jurisprudence' within the general area marked off for joint government has no place in deciding what area has been marked off." Cox, *Reflections upon Labor Arbitration*, 72 Harv. L. Rev. 1482, 1506 (1959). No obligation which is outside of the contract may be imposed on the employer by the arbitration. The delineation

of the area marked off involves an examination of the bargain. The problem then is not one peculiar to the developing "industrial jurisprudence" of the national labor complex; instead it is one to be solved by reference to generally recognized concepts of justice and fair play which prohibit the remaking of a bargain fairly struck between the parties.

In the general arbitration field the arbitrator has long been forbidden to remake the contract or to impose additional burdens. Nothing is better settled in federal or state law than the principle which holds that an arbitrator cannot go outside the authority of the agreement. E.g. see *United States v. Farragut*, 22 Wall. 406 (1874). This question is for determination by the Court, and even the Union concedes at page 71 of its brief that this rule applies to a labor arbitration. The use of phraseology in the agreement to the effect that the decision of the arbitrator shall be final and binding applies only to matters encompassed by the agreement and does not prevent court inquiry as to whether authority was exceeded. *Arlington Towers Corp. v. John McShain*, 150 F. Supp. 904, 923 (DC D.C. 1956); *U. S. v. Farragut*, 22 Wall. 406 (1874).

In addition to the general law, the specific use in the case at bar of the more narrow type grievance clause covering differences as to "meaning and application" imposed a limit on the power of the arbitrator. He was not, through it, at liberty to determine his own jurisdiction. Cox, *Reflections Upon Labor Arbitration*, 72 Harv. L. Rev. 1482, 1509-10. Consequently, inquiry by the Court of Appeals as to whether the arbitrator exceeded his authority in making his award, was proper, such action being entirely consistent with national labor policy.

II. In this case the arbitrator exceeded his authority and by his award improperly modified and enlarged the provisions of the contract by erroneously granting the eleven grievants involved, back pay and reinstatement beyond the expiration date of the contract.

The bargaining contract was of one year's duration. After it expired on April 4, 1957, it was not renewed and no new contract of any kind has yet been entered into. All rights arose from the contract and protection of these rights terminated at its expiration. Those who remained in the employment of the company after that date held no rights under the contract.

Collective bargaining agreements do not create a permanent status, give definite tenure or extend rights created and arising under the contract beyond its life, when it has terminated. See for example the widely cited case of *System Federation No. 59 v. Louisiana & A. Ry. Co.*, 119 F. 2d 509 (CCA 5, 1941), cert. den. 314 U. S. 656. Also, it is beyond question that damages for wrongful discharge under a collective bargaining contract are limited to the period ending with the earliest date on which the employee could lawfully be discharged. Williston on Contracts (1937 ed.) Sec. 1359, p. 3815; *United Protective Workers Local No. 2 v. Ford Motor Co.*, 223 F. 2d 49 (CA 7, 1955).

Applying these concepts it is seen that the grievants were entitled to back pay only from date of discharge until the expiration date of the contract. This result is made all the more obvious by Union counsel's admission that after the contract expired, the Company was free to reinstate the men and fire them immediately afterwards, so long as an unfair labor practice was not committed. (Ent.R. 1a-22).

Moreover, the arbitrator, himself, did not rely on any interpretation of the contract for that portion of the award running beyond the termination date of the contract. He based his decision on an erroneous idea that after the contract had expired, the law offered protection against termination without cause. (Ent.R. 2a-23). As a result, the award was based on matters outside the scope of his authority under the contract, and did not depend upon his interpretation of the words of the contract.

Regardless of Union criticism, the cases and concepts briefly discussed in this summary were applicable and correctly applied by the court below. No case from a state or federal court has been brought forth by the Union to show otherwise. The Court of Appeals has not in any manner attempted to usurp the function of the arbitrator nor has it inquired into the merits of the controversy to determine whether discharge was justified. The remedy, or, as it may more appropriately be denoted, the damages awarded by the arbitrator exceeded his authority, but the court below has endeavored to rectify this, while yet showing the greatest deference for the arbitrator's award by separating and preserving its valid portions. This was done even in the face of the Company's contention that the entire award was invalid.

III. The decision of the Court of Appeals does not conflict with the decision of the National Labor Relations Board in *Local No. 611, International Chemical Workers*, 123 N.L.R.B. No. 182 (1959), and the Sixth Circuit in *N.L.R.B. v. Knight Morley Corp.*, 251 F. 2d 753 (CA 6, 1958) or with the federal labor policy. The Union imagines that because of the holdings of these cases, it is caught in a dilemma in that if it seeks

to discuss the discharges outside the grievance procedure to the point of deadlock, it is guilty of an unfair labor practice while, if it invokes arbitration, the employer can with impunity refuse to comply with the award. This is not true. The employer does not escape with impunity from a valid award. The Company in this case is being required *to pay a substantial sum of money to the grievants.* Furthermore, in the *Knight Morley* and the *Chemical Workers* cases the underlying concern was the same as in this case—contract rights were protected in order to give substance to the collective bargaining process. All of these cases implement the policy of Congress "which placed sanctions behind agreements to arbitrate grievance disputes * * * ." *Textile Workers v. Lincoln Mills*, 353 U.S. 448, at 456 (1957).

The entire matter is subject to regulation between the parties by their contract. If a union allows a contract to be terminated or does not provide for a contract of longer duration or fails to provide for contingencies, it cannot complain that federal policy favoring arbitration is thwarted. If additional or continuing rights are desired, the simple solution for the union is to provide in the contract for the disposition of grievances which are pending when the contract expires. Contrary to the Union's suggestion, it cannot be assumed that the decision of the Court of Appeals will encourage an employer to delay arbitration deliberately until the expiration date arrives, because he will be allowing great damages to accrue during the period the contract is still in effect. It is difficult to see, in the face of such severe economic sanctions, how the arbitration procedure will be inhibited.

IV. The reasoning of the Court of Appeals is not inconsistent with *Vitarelli v. Seaton*, 359 U.S. 535, 79 S.Ct. 968 (1959). That case is not remotely similar to the instant case on the facts, does not involve arbitration or a contract, and is permeated with policy considerations regarding procedural rights in national security investigations within an administrative department of the national government. *Vitarelli* is of limited application to its own peculiar and unusual factual circumstances.

ARGUMENT

I. Inquiry By The Court Was Proper To Determine Whether The Arbitrator Had Exceeded His Authority Vested In Him Under The Terms Of The Collective Bargaining Contract And Such Action Was Entirely Consistent With The National Labor Policy.

The philosophic premise underlying the Union's argument in this case is a self-serving echo of that current of thought which maintains that the law should stay out of grievance arbitration. See, e.g., Shulman, *Reason, Contract, and Law in Labor Relations*, 68 Harv. L. Rev. 999, 1024 (1955). Such thinking when carried to its ultimate fruition demands complete judicial abnegation. However, the national labor policy has now been firmly channeled in other directions.

After rejecting the idea of committing the supervision of the labor contract to the expertness of the National Labor Relations Board by making the breach of such a contract an unfair labor practice, the Congress that passed Taft-Hartley gave a general grant of jurisdiction to the federal courts to interpret and

See Conf. Rep. No. 510, 80th Cong., 1st Sess. 42 (1947).

construe labor contracts.[3] Section 301 of the Labor Management Relations Act provides legal sanction for collective bargaining agreements and while certain labor specialists may think that the courts are ill-suited for solving the problem, Congress has committed the national policy to a different view. Judicial enforceability of the rights and duties under labor contracts is very much with us and it is not to be supposed that time will reverse this policy. Whether the result is good or bad, the national policy has brought the courts into grievance arbitration so that "When a motion is filed to compel or stay arbitration or to enforce or vacate an award, the court becomes a superior tribunal and the arbitrator can make only such adjudication as the court permits." Cox, *Reflections Upon Labor Arbitration*, 72 Harv. L. Rev. 1482, 1487 (1959); also see *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957).

Admittedly, the collective bargaining agreement has characteristics all its own. And it may well be beneficial for arbitrators familiar with industrial processes to create and apply an industrial jurisprudence in processing disputes under such agreements. But while the collective bargaining contract has many unique facets, it is not, as many in the arbitration fraternity would theorize, completely and utterly unlike ordinary contracts to such an extent that it is subject to special rules "which only members of the cult can fully understand."[4] This type thinking is

[3] See Wellington, *Judge Magruder And The Labor Contract*, 72 Harv. L. Rev. 1268, 1298 (1959).

[4] These are the words of Professor Cox who deplores this authoritarian approach to the problem although admitting that there are many points of contrast between labor agreements and other types of contracts. See Cox, *Reflections Upon Labor Arbitration*, 72 Harv. L. Rev. 1482, 1489 (1959).

manifested by the Union in its brief at page 42, where it is said in reference to labor arbitration that

> "It is not necessary that they [the courts] become familiar with it [the institution of arbitration], but it is necessary that they respect it and defer to it if it is to continue to operate effectively as Congress intended it should, as a peaceful method of solving industrial disputes."

In warning of the danger of overstressing difference between the collective bargaining contract and so-called ordinary contracts, Professor Cox has admonished that

> "Often the difference is important, but the time has passed since we could simply erect a 'no trespassing sign' and separate industrial relations from the law. The law has moved into the sphere of grievance adjustment and contract administration. Labor relations has spilled over into judicial territory. Labor, management, and arbitrators must recognize that the law often expresses ideals and needs of society which limit their freedom of action. The law of contracts often embodies these ideals. It may also embody lessons of experience entirely applicable to collective bargaining agreements. Conversely the law can satisfy the needs of the industrial world only if there is a strong infusion of many of the ideas and conventions heretofore unknown to law but appropriate to group action, which have gained acceptance in the world of labor relations. It is not enough to halt after taking the important first step of emphasizing the unique aspects of collective bargaining agreements." Cox,

The Legal Nature of Collective Bargaining Agreements, 57 Mich. L. Rev. 1, 5 (1958).

In his dissent in *Lewis v. Benedict Coal Corp.*, 80 S.Ct. 489, 496, 498 (1958) Justice Frankfurter has voiced much the same sentiment and has stated that:

> "* * * There is no reason for jettisoning principles of fairness and justice that are as relevant to the law's attitude in the enforcement of collective bargaining agreements as they are to contracts dealing with other affairs, even giving due regard to the circumstances of industrial life and to the libretto that this furnishes in construing collective bargaining agreements."

The fear of Justice Frankfurter and of Professor Cox is that simply because it can be shown that collective bargaining agreements have characteristics which bar the application of some familiar contract principles, there is a great danger that those who are well grounded in collective bargaining will demand a complete discarding of contract law and a creation of a new law of collective bargaining agreements. Of course, this would be extremely unwise. Many legal doctrines are based upon time-tested notions of fairness and sound public policy. No one would deny that there is present a wide difference in the rules, precepts and concepts which are applied to different kinds of contracts within the commercial and private field as distinguished from the labor contract. Certainly there is as much difference between a long-term requirements contract and the problems involved in the sale of real property or a contract to build a house as there is between collective bargaining contracts and what the labor specialist denotes "ordinary

contracts." It is a foolish waste to have to climb the ladder all over again "just because the suggested principles were developed in other contexts." As Professor Cox states:

> "* * * Should not our attitude be one of inquiry into the pertinency of the reasons for each contract rule? Some contract rules stand up well in the new environment * * *. They appear to be those which derive from functional aspects of commercial contracts that are also important characteristics of collective bargaining agreements. The doctrine of failure of consideration and the element of 'bargain' or 'exchange' furnish a prime illustration." Cox, *The Legal Nature of Collective Bargaining Agreements*, 57 Mich. L. Rev. 1, 15 (1958).

The solution to the problem lies not in the wholesale discarding of the accumulated wisdom of contract law. It must be found in conscious selectivity directed toward the avoidance of the application of inapposite principles. This process of synthesis is not a new one and is one which has long been employed in the development of the law. Requirements contracts, for example, require a different handling than a trust indenture and yet there are general concepts extremely useful and of universal application to both types. Just as certain business practices have crystallized into precepts of commercial law, the "law of the shop" has its role to play in formulating an industrial jurisprudence.

See Cox, *The Legal Nature of Collective Bargaining Agreements*, 57 Mich. L. Rev. 1, 14 (1958) for a discussion of this thesis.

Even though the nature of a collective bargaining agreement may call for an arbitrator to apply industrial jurisprudence to settle a grievance without hindrance of the bare or literal meaning of contract wording, it is clear that there are and must be definite limits to the arbitrator's function. These limitations will be revealed by the particular situation. For example, the phrasing of the arbitration clause is of great importance. A narrow arbitration clause limited to "interpretation and application," similar to that present in this case, embodies restrictions upon the arbitrator not present when a wide-open clause is used allowing arbitration of "any dispute, difference, disagreement or controversy of any nature or character." The arbitrator, therefore, is not free to utilize a complete legal system to determine the rights and duties existing between the parties:

> "Whatever the indicia, however, they must be found in the relationship created by the particular contract, and no obligation which is outside of the context of the contract may be imposed upon a company by an arbitrator. In this sense, the management-rights theory seems sound. *The imperative which requires a body of 'industrial jurisprudence' within the general area marked off for joint government has no place in deciding what area has been marked off.*" (Emphasis added). Cox, *Reflections Upon Labor Arbitration*, 72 Harv. L. Rev. 1482, 1506 (1959).

Accordingly, in deciding the scope of authority of the arbitrator—that is whether an obligation is within or without the context of the contract—the uniqueness of the industrial complex has no controlling force.

Special exegesis from the labor arbitration academy is not necessary because the area under consideration is outside the realm wherein the so-called exclusive knowledge of the "law of the shop" is applicable. The delineation of the area which has been marked off by the parties in the contract for "joint government" involves an examination of the obligations bargained for.

At this point, the functional aspects so familiar to commercial contracts are equally characteristic of the collective bargaining contract. The problem is not then one peculiar to a body of industrial jurisprudence; instead, it is one to be solved by reference to generally recognized contract concepts of justice and fair play which prohibit the remaking of a bargain fairly struck between the parties.[6]

In the general arbitration field the arbitrator has long been forbidden to remake the contract or reimpose additional burdens not contemplated by the parties. Nothing is better settled in federal or state law than that principle which holds that an arbitrator cannot go outside of the authority afforded him under the contract of submission. State and federal common law decisions and decisions under the Federal Arbitration Act clearly buttress this conclusion and aptly demonstrate the universal lack of discord on the point. *United States v. Farragut*, 22 Wall. 406 (1874); *Arlington Towers Corp. v. John McShain*, 150 F.Supp. 904, 923 (DC D.C. 1957); *Texoma Natural Gas Co. v.*

[6] For a general discussion of the principle which prohibits the modification or the creation of a new or different agreement from that contracted for by the parties see 12 Am.Jur., Contracts, Sec. 228, wherein voluminous citation to the decisions of this Court is made.

Oil Workers International Union, Local 463, 58 F.Supp. 132 (DC Tex. 1943), aff. 146 F.2d 62, cert. den. 324 U.S. 872, rehearing den. 325 U.S. 893; *Simmons v. Simmons*, 85 W. Va. 25, 100 S.E. 743 (1919). In 3 Am.Jur., *Arbitration and Award*, Sec. 41, it is pointed out that:

> "* * * It is for the court, not the arbitrators, to decide whether the latter have exceeded their powers under the submission or have refused to exercise them, for since the submission is the foundation of the arbitrators' jurisdiction, their construction of it with respect to their own powers, unless clearly pursuant to its terms, is not conclusive."

Under the Federal Arbitration Act, in *Application of States Marine Corp. of Delaware*, 127 F.Supp. 943, 944 (DC N.Y. 1954) it was held that if arbitrators determine a matter not within the terms of the arbitration agreement or fail to determine matters within the terms of such agreement, they have "exceeded or imperfectly executed their jurisdiction, and their award should be vacated." Again, in *Texoma Natural Gas Co. v. Oil Workers International Union, Local 463*, 58 F.Supp. 132, 146 (DC Tex. 1943), aff. 146 F.2d 62, cert. den. 324 U.S. 872, rehearing den. 325 U.S. 893, in a case involving labor arbitration, it is pointed out:

> "* * * If the matters determined are not within the terms of the submission (i.e. within the arbitration provisions of the contract), or the arbitrators in making their award go beyond the contemplation of the parties, as reflected in the contract, they

obviously exceed their jurisdiction, and their award may be set aside in an appropriate proceeding."

The point is so universally accepted that the Union in the instant case concedes at page 71 of its brief that in a labor arbitration a court is empowered to reverse an arbitration decision when the arbitrator exceeds his jurisdiction. Even the case of *Burchell v. Marsh*, 17 How. 344, 349 (1855) cited by the Union explicitly proclaims that the award must be within the submission in order to preclude court review.

The fact that the arbitration contract contains language to the effect that the decision of the arbitrator shall be final and binding, as did the contract in this case, does not at all affect the right to question whether the award exceeds the arbitrator's authority. The award can be conclusive only as to those things properly submitted; this is all that is meant when it is said that the arbitrator's decision shall be final and binding. The phraseology means merely that as to all things validly submitted, the parties are precluded, a self-imposed *res judicata* so to speak. This commonly used language does not imply that the arbitrator has carte blanche to remake and reconstitute the agreement.

In *Arlington Towers Corp. v. John McShain*, 150 F.Supp. 904, 923 (DC D.C. 1957) in a labor arbitration involving the Arbitration Act it was stated:

> "*Although the Arbitration Agreement specifically provides that the award of the Arbitrator shall be final and binding, that neither party will contest such findings and that neither party will appeal from any por-*

> *tion of the final judgment, there appears to be no doubt but that the plaintiffs are within their rights in challenging the Arbitration award, particularly on the grounds that the Arbitrator exceeded his authority* and upon the grounds of fraud, bias and prejudice." (Italics ours).

Likewise the Supreme Court itself long ago held that expressions in the submission agreement saying that awards shall be final and conclusive cannot operate to give effect to an award which does not conform to the submission. *U. S. v. Farragut*, 22 Wall. 406 (1874).

Consequently, in the instant case the arbitrator was not free to remake the contract. He was circumscribed and limited to those matters and things which are within the scope of the contract and the Court had the power as well as the duty to examine the award to see if it were in excess of the contract terms.

Nevertheless, the Union now argues that since the arbitrator had jurisdiction to interpret and apply the agreement, "his decision as to what the agreement requires the employer to do, if fairly reached, should not be reviewable by any court." (Petitioner's Brief, 71). In advocating this bootstrap doctrine the Union has overlooked the fact that the clause with which we are concerned is of a comparatively narrow type. The grievance clause extends only to differences "as to the meaning and application of the provisions of this agreement." (Ent.R. 2a-4.) It does not grant unlimited authority to the arbitrator. Professor Cox has distinguished between a clause of this nature and a more wide-open clause by saying:

"* * * Even though an arbitration clause covering only 'disputes concerning the interpretation and application' of the collective agreement cannot mean barely the translation of words, it must impose some limit. The phrasing of the arbitration clause is often an important issue in collective bargaining. Experienced negotiators are thoroughly aware of their ability to choose between the comparatively narrow clause noted above and a wide-open undertaking to arbitrate 'any dispute, difference, disagreement or controversy of any nature or character' which may arise during the term of the agreement. When the former clause is selected, the company believes that a limit has been imposed upon the power of the arbitrator. The union would also acknowledge that his authority is narrower than if the union had been able to persuade the company to accept a wide-open clause. * * *" Cox, *Reflections Upon Labor Arbitration*, 72 Harv. L. Rev. 1482, 1500 (1959).

Cox is persuaded that the conventional clause like the one now before the Court is not an agreement which allows an arbitrator to determine his own jurisdiction. Cox, *Reflections Upon Labor Arbitration*, 72 Harv. L. Rev. 1482, 1509 (1959). His remarks upon the subject are logical and compelling:

"Nevertheless, I am persuaded that the conventional arbitration clause is not an agreement which allows an arbitrator to interpret its meaning, thereby determining his own jurisdiction. The contrast between the wide-open clause and the conventional phraseology is too plain to put down to inadvertence. The apparent purpose is to confine the power of the arbitrator. Apparently

> the parties choose it because one party, usually the employer, distrusts arbitration at least to the point of insisting upon the inclusion of some safeguard against the arbitrator's imposition of significant obligations not contemplated by the agreement and quite beyond its scope. The clause does not tell what the arbitrator should not do. It tells what he cannot do. The protection sought by the employer would be drastically reduced by a construction which gave the arbitrator unlimited power to determine his own jurisdiction and merely warned against its exercise, for as a practical matter he would then have the power to impose obligations outside the contract limited only by his understanding and conscience. We can give effect to the underlying purpose only by excepting the interpretation of the arbitration clause from the general power to interpret, * * *." Cox, *Reflections Upon Labor Arbitration*, 72 Harv. L. Rev. 1482, 1509-1510 (1959).

This forcibly demonstrates that the arbitrator did not have, under the language of the agreement, the jurisdiction to exclusively determine his own jurisdiction. He could not pull himself up by his own bootstraps.

II. The Arbitrator Exceeded His Authority In Allowing Back Pay And Reinstatement Beyond The Contract Termination Date And The Fourth Circuit Did Not Err In Holding That Portion Of The Award Invalid.

Under this point of argument we propose to discuss first the principles which disclose that the arbitrator did exceed his authority, and then to refute the Union's argument that the Court of Appeals relied upon inapplicable precedents to set aside the invalid portion of the award.

A. The arbitrator exceeded the authority vested in him by the contract.

In this case the arbitrator exceeded his authority and by his award improperly modified and enlarged upon the provisions of the contract by erroneously granting the eleven grievants back pay and reinstatement on a theory that they had employment security rights continuing even beyond the expiration of the collective bargaining contract. The Court of Appeals so held and that portion of the award going beyond the termination date was declared to be invalid. Our position is that since the contract had terminated at the time of arbitration, only monetary compensation for loss of pay from the date of discharge on January 18, 1957, to April 4, 1957, the termination date of the contract, could be awarded. All rights of the grievants arose from the contract and they were guaranteed protection from discharge without cause only until April 4, 1957.

The particular grievance involved in the arbitration occurred on January 18, 1957. The bargaining contract under which arbitration was had, by its very terms was of one year's duration. (Ent.R. 1a-18). It expired on April 4, 1957, at midnight. It had no renewal clause and was not renewed. After April 4, 1957, there was no agreement of any kind between the Company and the employees or their Union. (Ent.R. 1a-20, 21, 22; also "Decision and Award" of the arbitrator Ent.R. 2a-18).

It is beyond question that damages for wrongful discharge under a collective bargaining contract are limited to the period ending with the earliest date on which the employee could lawfully be discharged. See Williston On Contracts (1937 ed.) Sec. 1359, p. 3815;

United Protective Workers Local No. 2 v. Ford Motor Co., 223 F. 2d 49 (CA 7, 1955); *Odell v. Humble Oil & Refining Co.*, 201 F. 2d 123 (CA 10, 1953) and cases cited therein.

In *United Protective Workers Local No. 2 v. Ford Motor Co.*, 223 F.2d 49 (CA 7, 1955) the Union brought suit for *reinstatement and back pay* for Joseph Orloski, claiming that a collective bargaining agreement prevented his discharge except for cause. On June 21, 1945, the company had signed a group annuity contract for the benefit of those of its employees who received a certain salary and who chose to participate in the plan. Retirement age was defined as 65 with optional earlier retirement under certain specified conditions. On September 26, 1947, after a wage increase, Orloski elected to enter the plan and signed an acceptance and salary deduction authority. On April 24, 1949, Orloski was retired against his will and was thereafter paid $20.00 per month under the annuity plan. Orloski never at any time knew of the company's alleged policy of compulsory retirement.

The District Court dismissed the complaint for failure to state a cause of action. On appeal the Court of Appeals reversed and remanded the case for answer. It held that under the collective bargaining contract then in effect the company did not have the right to retire the plaintiff without his consent, but that since he had an adequate remedy at law he could not have specific performance and must rely on recovery of damages. On remand to the District Court, the Court awarded damages to Orloski, but Orloski appealed to contest the measure of damages applied. In sustaining the lower court the Court of Appeals commented at 223 F 2d 52:

"In setting the amount of damages, the District Court awarded Orloski the wages he would have made from April 25, 1949, the date of his retirement, until December 1, 1950. On March 1, 1950, a new retirement and annuity plan, to which Ford and the Union had both agreed, went into effect. The parties agree that under its provisions Orloski could have been retired on December 1, 1950. The plan also provided that with the permission of a special company board an employee could be retained until age 68.

"If Orloski had not been retired on April 25, 1949, he would have come under this new retirement plan. The trial judge had to determine when, under the new plan, Orloski would have been retired. He determined, reasonably we think, that Orloski would have been retired on the regular retirement date rather than the exception. Although there is no specific evidence on either side of the question, we feel that the trial judge's choice was the more reasonable of the two and was supported by the record as a whole.

"The general rule which the trial judge followed is stated in Williston, On Contracts (1937 ed.) Sec. 1359, at page 3815: '*It is not uncommon for contracts of employment to contain a provision for termination upon a certain period of notice. In such a case, the damages are limited to the nearest date at which the employer could rightfully exercise his privilege.*'" (Italics ours.)

From this it will be seen that lost wages can only be awarded to the earliest possible date on which the contract could be legally terminated. Since Orloski could have been legally retired and discharged from em-

ployment on December 1, 1950, lost wages for wrongful discharge must run only until that time regardless of the possibility that his employment could have run for additional years under the exception allowing employees to be retained under certain circumstances until age 68. The same principle applies here. In our case we find that the earliest possible date upon which the grievants could have been rightfully terminated, assuming good conduct on their part, was April 4, 1957, the expiration date of the contract. Therefore, loss of wages can run only until that date.

In *Odell v. Humble Oil & Refining Co.*, 201 F.2d 123 (CA 10, 1953), cert. den. 345 U.S. 941, it was held that where an employment contract provided that it could be terminated by either party by giving thirty days' notice in writing, one month's salary was the maximum amount recoverable by discharged employees for alleged breach of contract by employer in discharging employee. The plaintiffs in the action each sought judgment for $100,000 and punitive damages of $100,000. The District Court dismissed the cause of action because it appeared from the complaint that the maximum possible recovery of each discharged employee was less than the $3,000 jurisdictional amount. At 201 F.2d 123, 128, the Court said:

> "The contract with the employees' bargaining representative provided that it could be terminated by either party by giving thirty days notice in writing. *Where a contract of employment expressly empowers an employer to terminate the contract upon giving notice, recovery for wrongful breach is limited to the notice period.* The complaint alleged that each appellant was receiving a salary which together with other valuable incidents to his job was of the value of $500

per month. Under the provisions of the contract, one month's salary was the maximum amount recoverable for breach of the contract." (Italics ours).

It is manifest that no recovery can be had for damages for unlawful discharge arising after the termination date of the contract or after the date when the contract could have been effectively terminated by the employer. Collective bargaining agreements do not create a permanent status, give indefinite tenure or extend rights created and arising under the contract beyond its life when it has terminated. See *System Federation No. 59 v. Louisiana & A. Ry. Co.*, 119 F.2d 509, 515 (CCA 5, 1941), cert. den. 314 U.S. 565; *Elder v. N.Y.C. Ry. Co.*, 152 F.2d 361 (CA 6, 1945); *Cardenas v. Wilson & Co.*, 180 F.2d 828 (CA 10, 1950); *Shiels v. Baltimore and Ohio Railroad Co.*, 154 F.Supp. 917, at 925 (DC Ind. 1957) and cases therein cited; *Walker v. Pennsylvania-Reading Seashore Lines*, 142 N.J. Eq. 588, 61 A.2d 453, 462 (N.J. 1948).

In *System Federation No. 59 v. Louisiana & A. Ry. Co.*, 119 F.2d 509 (CCA 5, 1941), cert. den. 314 U.S. 565 plaintiff Union brought suit on behalf of certain of its members under authority of the National Railway Labor Act to enforce a favorable award of the National Railroad Adjustment Board. The claim in general was that the defendant Railway Company had wrongfully deprived the employees of seniority rights under a collective bargaining agreement effective August 1, 1929, by furloughing them from service upon the untrue pretext that a reduction in force was then necessary or by denying their return to service when in fact defendant was actually hiring new men or advancing men junior in seniority. The agreement of August 1, 1929, set up the rules and working condi-

tions under which all the shop craft employees of the defendant should perform their services. Under the agreement, these employees were accorded certain legal rights of seniority, among which was the right that if employees should be furloughed from service due to a reduction in force, they should be restored to service in the event of an increase in forces in order of their seniority. In this agreement no restriction was placed upon the length of time during which furloughed employees might retain their right to reinstatement thereunder. This agreement was terminated on February 7, 1931. See *System Federation No. 59 of Railway Employees v. Louisiana & A. Ry. Co.*, 30 F.Supp. 909 (DC La., 1940). It would appear that from 1930 until resort was had to the Railway Labor Board the Railway Company refused to confer with the union regarding the grievances. 119 F.2d 509 at 513, footnote 9.

Company rules of February 9, 1931, were then substituted in lieu of the provisions of the contract. Later, in 1937, another agreement covering the rules and working conditions of the employees was entered into between the Union and the Railway Company. While there were claims for furloughing occurring after February 7, 1931, we need only be concerned with the employees who claimed illegal furlough between August 1, 1929 and February 7, 1931. Their situation is analogous to that of the eleven grievants in the instant case.

The Court in considering their claims stated at 119 F.2d 509, 515 that:

> "The only question with which we are here concerned is whether the seniority rights claimed, arise out, and exist, because of, the

1929 contract, and persist during and only during its term, or whether they indefinitely continue to exist after it has been abrogated, and the relations of employer and employee are no longer fixed and being carried on under that contract, but for many years under rules, promulgated by the company, and later under a contract between the company and the union which affirms that it 'covers all understandings now in effect.'

"*On this point the authorities are uniform. They settle it that collective bargaining agreements do not create a permanent status, give an indefinite tenure, or extend rights created and arising under the contract, beyond its life, when it has been terminated in accordance with its provisions.* Authorities, supra. The rights of the parties to work under the contract are fixed by the contract. They persist during, they end with, its term. After the termination of the 1929 contract, those who remained in the employ of the defendant, or came into it afterwards, held their tenure and such rights as they had, not under the 1929 contract, but at first under the company rules and later under the 1937 contract, and none of them can claim rights contrary thereto.

"*The rights accorded plaintiff and its members under the 1929 contract are clear. Under it, any of the persons named who were furloughed during its continuance had a right, during the life of the contract, to apply for reinstatement under its terms. After its abrogation that right was lost and reinstatement could not be claimed under its terms,* but only under the terms of the company rules until 1937, and after 1937, under the terms of the 1937 contract.

"If, on February 7, 1931, when the 1929 contract was abrogated, any of those furloughed before that date, had decided not to return to work, they could have stood upon their claim, that they had been furloughed contrary to the terms of their contract, and sought reparation for the time lost while the contract was still in force. *They could not, because the contract had been breached as to them, claim that the breach had extended its life, so as to entitle them to time lost, and to reinstatement, after its abrogation.* No claim ever has been made for damages up to the time of the contract's abrogation. No such claim is made now. The claim as made before and now is not for loss of wages up to the abrogation of the 1929 contract. It is for loss of wages up to the present time, together with the right to displace and take the place of those who working for the company, under the 1931 rules, were working for it when the 1937 contract was made, and are working for it now under the terms of that contract." (Italics ours).

This language shows great similarity to the instant case. Here, the contract and its terms were to endure from April 5, 1956 through April 4, 1957. The eleven grievants involved were found by the arbitrator to have been wrongfully discharged on January 18, 1957, even though they were guilty of sufficient misconduct to be penalized with a ten-day suspension. The company was ordered to reinstate each of the grievants who so desired reinstatement, with the same classification and seniority status as of the date of discharge, and the company was ordered to reimburse grievants for all time actually lost from work which they would otherwise have had from the com-

pany, less the ten-day suspension and less amounts acquired from other employment since ten days after January 18, 1957.

At this point it should be noted that the arbitrator by his own reasoning did not rely on the language of the contract to support that portion of the award which the Court of Appeals held to be invalid. In this connection the Union, at page 69 of its brief, erroneously asserts that the Company argued to the arbitrator that the termination provision of the contract prevented reinstatement after the expiration date of the contract. This is not so. The Company merely asserted that since the contract had expired, the entire matter was moot and therefore not subject to arbitration. (Ent.R. 2a-18.) Nothing, however, was mentioned concerning whether the language of the contract could be interpreted to extend the right of reinstatement beyond expiration. In attempting to refute the contention of mootness the arbitrator pointed out that the agreement was in effect some months after the grievance arose. Then at that juncture he departed from the terms of the contract entirely, saying that the status of the grievant employees

> "* * * continued during the subsequent period of negotiations for contract renewal. They were protected by the law from improper discrimination or termination of their employment without good cause. Their grievance presented a continuing controversy as to rights of employment, reinstatement and back pay." (Ent.R. 2a-23).

Plainly, the arbitrator has gone beyond the scope of the contract in making his award. He has exceeded the authority vested in him by the contract itself. This

contention of continuing rights advanced by the arbitrator is the same one which was repudiated by the Court in *System Federation No. 59 v. Louisiana & A. Ry. Co.*, 119 F.2d 509 (CCA 5, 1941), cert. den. 314 U.S. 565. The rights of the parties herein were fixed by the contract and ended when it ended. After its termination, those who remained in the employ of the defendant Enterprise or who were hired afterwards held no rights under the contract because it was not extended or renewed nor was there any other collective bargaining contract or agreement entered into between the Company and the plaintiff Union. (Ent.R. 1a-20); also admission of Union Counsel, Transcript of Hearing of December 11, 1958 (Ent.R. 1a-22).

From the portion of the decision of the arbitrator quoted above, the arbitrator mistakenly states that the grievants even after the expiration of the contract were protected by law from improper discrimination or termination of their employment without cause. Such is not the law.

Under the Labor Management Relations Act employers may not discriminate in hire or tenure of employment or any term or condition of employment if the discrimination is intended to encourage or discourage membership in a labor organization, but it is well accepted law that an employer may discharge an employee for any reason, reasonable or unreasonable, so long as it is not for a reason prohibited by the act. See *National Labor Relations Board v. Standard Coil Products Co.*, 224 F.2d 465 (CA 5, 1955); also *United States Steel Corporation v. Nichols*, 229 F.2d 396, at 399 (CA 6, 1956), cert. denied 351 U.S. 950 (1956).

There is no question here involved of discrimination because of Union activity. The fact that the arbitrator himself found that the conduct of the grievants merited disciplinary action in the form of a ten-day suspension readily demonstrates that the defendant was not attempting to discriminate because of bias toward union activities, nor has the arbitrator even suggested such a thing. Even if there were a question of discrimination because of union activity, the employees' rights in this regard would be enforceable only in an unfair labor practice charge before the National Labor Relations Board and not in a proceeding of this type. *Amazon Cotton Mill Co. v. Textile Workers Union*, 167 F.2d 183, 190 (CCA 4, 1948).

An unfair labor charge concerning the eleven grievants here w: rought before the Board on July 3, 1957, but the Board refused to issue a complaint. (Ent.R. 2a-10, 43). Also the six months statute of limitations provided by Sec. 10(b) of the National Labor Relations Act, 29 USCA has long since barred any additional charge of this type.

In any event, the protection of the Act had no application in the instant case and the arbitrator was to be governed and guided by the contract itself. The relationship was created by the contract and any guarantee that the employer should not discharge except for cause flowed from the contract and not from any statutory or common law. While a dispute arising during the life of a contract providing for arbitration may be arbitrated after that contract expires, see *Lane v. Endicott-Johnson*, 80 N.Y.S.2d 639 (1948) aff. 87 N.E. 2d 450 (1949); also *Item Company v. New Orleans Newspaper Guild*, 256 F.2d 855 (CA 5, 1958), such a proposition does no harm to the argument we

advance here as it is universally recognized that a suit for breach of contract may be brought after the contract has expired. Cases like the *Endicott* and *Item* cases merely hold that arbitration may be resorted to and they have nothing to do whatsoever with whether the award may go beyond the term of the contract.

In asserting that the award cannot be reviewed, the Union has confused the finding of fact by the arbitrator with the limitation imposed on him by the agreement delineating his authority. The Court of Appeals did not in any manner attempt to review or upset the arbitrator's final determination as to whether the discharge was justified and neither has the Company questioned this determination. The merits of the controversy were not entered into and the Court did not take it upon itself to make a *de novo* finding. The Court merely determined that the agreement did not afford authority for the remedy or damage the arbitrator attempted to impose by his award.

B. The precedents upon which the Court of Appeals relied are applicable to the case at bar.

The Union now argues that the precedents established by the cases discussed above and applied by the Court of Appeals are inapplicable. This is so, says the Union, since they are not on all fours and because they do not involve the question of remedy, but consider only whether there was a violation of the contract in the first instance. Our answer to this first criticism is that the principles enunciated by the cases are not weakened by the fact that they are not on all fours with this case. The cases cited by the Court clearly state and recognize the principles relied on and under their factual circumstances conclusively show that

rights of employees under a collective bargaining contract terminate when the contract is terminated. To show that the second contention as to inapplicability is equally baseless we need only to refer to such cases as *System Federation No. 59 v. Louisiana & A. Ry.*, 119 F.2d 509 (CCA 5, 1941); *United Protective Workers v. Ford Motor Co.*, 223 F.2d 49 (CA 7, 1955); and *Odell v. Humble Oil & Refining Co.*, 201 F.2d 123 (CA 10, 1953), cert. den. 345 U.S. 341 (1953). These cases were very much concerned with the question of remedy.

The Union maintains that *System Federation No. 59 v. Louisiana & A. Ry. Co.*, 119 F.2d 509 (CCA 5, 1941), cert. den. 314 U.S. 565 (1941) does not apply, and that "the question was whether employees who were furloughed during or after the term of an agreement can gain reinstatement on the basis of their seniority after the agreement expires." (See Petitioner's Brief, 77). Of course the Union omitted the word "wrongfully" when speaking of the furlough during the term of the contract. The Court *held* that the right of reinstatement expired with the expiration of the agreement, and the question certainly was whether reinstatement after the expiration of the agreement was a proper remedy for the violation of rights during the term of the agreement. The case is not distinguishable from the present case and has not been distinguished in the Union's brief.

Finally, the Court's reliance on *United Protective Workers v. Ford Motor Co.*, 223 F.2d 49 (CA 7, 1955) and on *Odell v. Humble Oil & Refining Co.*, 201 F.2d 123 (CA 10, 1953), cert. den. 345 U.S. 941 (1953) is attacked as being improper. These cases recognize and discuss the rule that where a contract of employment

contains a provision for termination after a period of notice, damage for wrongful discharge will be limited to the notice period. The Union declares that the wrong committed when an employee is wrongfully discharged under an agreement containing a notice provision is not the discharge itself, but the failure to give notice. The Union reasons that the result obtained in such cases is opposite from that which would be obtained in the instant case. In the instant case, says the Union, it must be assumed that the employment would be continued after the contract has expired. In a case where the contract had a notice period, it would, in the words of the Union, "not be realistic to assume that if the wrong had not been committed the employee would not have been discharged; the natural assumption is that he would still have been discharged but with proper notice." (Petitioner's Brief, 80). We fail to comprehend the distinction. It would seem just as logical and realistic to say that in our case the employees would have been terminated at the earliest possible date it would have been lawful to do so. But this type of speculation is ridiculous. It is not a matter of speculation as to whether employment would have continued but is a matter of what rights were granted in the bargaining contract and that alone.

Moreover, we think it should be noted that in *United Protective Workers v. Ford Motor Co.*, 223 F.2d 49 (CA 7, 1955), while the concept of limiting damages to the notice period was discussed, the principle underlying that rule was shown to have a broader basis than that now imputed by the Union. In that case it will be remembered the employee was unlawfully discharged under the terms of a collective bargaining contract. After the discharge, by agreement of the

Union and the employer, the contract was modified providing that employees could be terminated at a particular age with the right to remain for additional years with permission from the company. In determining damages for the employee, the court allowed recovery only on the basis that the employee would have worked to the earliest age and not the later. The rule which allows damages only for the notice period in those contracts providing for notice, was discussed and approved, to reveal that the true principle behind the rule is that damages for wrongful discharge are limited to the period ending with the earliest date on which the employer could lawfully discharge the employee.

The wrong in the case was not the failure to give notice but was a pure and simple act of wrongful discharge. It was recognized, as it was by the Court of Appeals below, that damages for wrongful discharge cannot continue beyond the date when the guarantee of job rights has expired because after such time the right of the employer to discharge the employee is unrestricted. Therefore, the Union's criticism of the Court's reliance on *United Protective Workers v. Ford Motor Co. and Odell v. Humble Oil & Refining Co.* is unveiled as being totally baseless. If we must resort to assumption as to the continuance or noncontinuance of employment on expiration of the contract, we reach the inevitable conclusion that the law assumes that the employment will not continue.

In *Eubanks v. Galveston, H. & S. A. Ry. Co.*, 59 S.W. 2d 825 (Tex. Com. App. 1933) a railway employee claimed wrongful discharge. The contract provided that if it should be determined by a board of adjustment that an employee had been wrongfully discharged he should be reinstated and

paid for time lost. The contract also stated that either party could withdraw from the contract at the end of a year by serving ninety days notice. The board found that the employee was wrongfully discharged. The railway company refused to abide by the decision of the board. Suit followed for damages based on the award and the trial court concluded as a matter of law that the employee was entitled to loss of pay for his life expectancy. The appellate court held that this was erroneous for the reason that the permissive termination clause in the contract prevented the contract from being one for life. In language which would seem tailor-made for our case the court said at 59 S.W. 2d 825, 827:

> "* * * we have absolutely no way of knowing how long the contract made the basis of this suit will be kept in operation, except for the current year, and the year following; where the time for notice has expired."

The court would not assume that the employment would have continued beyond the possible termination date of the contract. The same reasoning applies here.

In further pressing its point that it must be assumed that the eleven men involved in the arbitration would have continued to work beyond the expiration date of the contract, the Union relies upon *Western Union Division, Commercial Telegraphers, Commercial Telegraphers Union v. Western Union Telegraph Co.*, 83 NLRB 238 (1949). See Petitioner's Brief, 81. This Board decision, along with the decision in *National Labor Relations Board v. Victor Metal Products Corp.*, 106 NLRB 1361 (1935), was held by the Court of Appeals not to be controlling upon the basis that:

> "* * * The power of the National Labor Relations Board to formulate policies and prescribe disciplinary procedures to effectuate the purposes of the statute is not restricted by the terms of the contract between the employer and the union, as must be the case when either party to a labor agreement sues for specific performance or breach of contract under Sec. 301 of the statute. * * *" (Ent.R. 45).

In the *Western Union* decision the employer was specifically prohibited by the Merger Act from furloughing employees within four years of its merger with another telegraph company. The Board held that since the furlough occurred within the four-year statutory protection period, it could order reinstatement even though its decision was reached after the four year period had expired. The Board would not assume that the Company would have furloughed the employees immediately upon the expiration of the four-year period.

It must be noted in connection with this administrative decision that Congress entrusted the enforcement of employee rights under the Merger Act to the National Labor Relations Board and provided "the same remedies as are provided by the National Labor Relations Act in the case of employees covered by that act." Moreover, as the Board itself recognized

> "* * * the Merger Act imposed no time limitation upon the power of the Board to prescribe proper relief, and, except, perhaps, for the limitations contained in the National Labor Relations Act prior to amendment, places no limitation upon the nature of the

remedies. Thus, the Board is free to adopt those remedies within the framework of the National Labor Relations Act prior to amendment as it finds the situation merits."

The remedy for a wrongful discharge under the National Labor Relations Act is reinstatement and reimbursement for the loss of wages from date of wrongful discharge until the date of the offer of reinstatement. Consequently, the Merger Act provided the right as well as the remedy and the remedy extended the right of reinstatement specifically to such time as reinstatement was offered. The rights there, as the Court below pointed out, were purely statutory and did not involve contract law or contract principles as is the situation in the instant case.

We readily agree that the National Labor Relations Board may reinstate employees who have been wrongfully discharged because of some activity prohibited by the Act regardless of whether a contract of employment is in existence or has expired at the time reinstatement is ordered. This is so because such right is created by statute and the purpose of the Act could be easily thwarted if private contracts were allowed to prevail. Here we have no statutory prohibitions and the only rights available to the parties are those private rights created by contract law.

National Labor Relations Board v. Victor Metal Products Corp., 106 NLRB Rep. 1361 (1953) dismissed by the Court along with the *Western Union* case is also distinguishable from the instant situation on this basis. In that case the union had illegally discriminated against an employee so as to cause her discharge.

In ordering the union to make up her loss of wages, the fact that the union's collective bargaining contract had expired was held by the Board to be of no significance. This is entirely different from the case at hand because the employee's right arose directly out of the National Labor Relations Act and not from the contract, as here.

While the Union says that it cannot be assumed that employment would have terminated at the expiration of the contract, we might also add that there is no basis for assuming that it would not have terminated. However, there is no need here to indulge in such baseless speculation, for the law of contracts in order to impart certainty has provided, as we have seen, that damages can be received only until the termination date of the contract. It would be inconceivable that a man working under, say, a five-year employment contract and discharged without cause after three years, could recover damages not only for the two remaining years but also on into the future, ad infinitum. It is equally inconsonant with recognized principles to assert here that a fixed term employment contract can be extended indefinitely into the future.

In its discussion of the precedents applied by the Court of Appeals the Union has not once cited a court decision, federal or state, where the award of an arbitrator has been confirmed or where damages have otherwise been prescribed for any period continuing after the applicable agreement has been terminated. In trying to sustain its position the Union has relied upon an arbitrator's decision entitled *In Re Armour & Co. and United Packing House Workers of Local 15*, 11

L.A. 600 (1948). In the *Armour* decision there is not one authority cited by the arbitrator in support of his argument that reinstatement and back pay can be allowed after the contract expiration date. The decision makes the fallacious argument that if reinstatement and back pay is not so ordered, then redress of unwarranted discharge would be for naught. This overlooks the fact that the contract gives only so much redress as remains in time under the contract, that is to say if a day or hour remains of the contract, this is all the right to work that is left. For example, if a contract has one day to run and wrongful discharge occurs, the man is entitled to work one day to be made whole again. If the contract expires and all contract relationship ceases before he is made whole again, then he is entitled to one day's wages only. He would not, as the Union contends, be entitled to continue to work just as if the contract had not expired. The Union destroys the validity of its own argument on this point by admitting that after the contract had expired the Company could have reinstated the men and fired them immediately without cause. (Ent.R. 1a-22).

While not mentioned in its brief before this Court, the Union in the court below urged that *In Re Roto Supply Sales Co.*, 28 LA. 657 (N.Y.Sup.Ct. 1957) and *Lodge No. 12 IAM v. Cameron Iron Works*, 257 F.2d 467 (CA 5, 1958) also were authorities which upheld the award. *In Re Roto Supply Sales Co.* does not consider the scope of authority question, the facts being entirely different from those present in this case. The case merely holds that a dispute arising during the life of a contract may be arbitrated after termination, a proposition that is unquestioned by us. See page 42 above. The *Cameron Iron Works* case was claimed to have decided the question involved here without discussion. However, it appears from a reading of the case that the contract had not expired and that the renewal clause had been exercised to continue the contract life.

There are vital distinctions between the *Armour* award and the instant case. There, a new contract of employment became effective immediately on the termination date of the old and there was a continuing relationship that does not exist here. Moreover the arbitrator operated under a much broader wide-open-type arbitration clause.

Then too the weakness of the *Armour* argument is further highlighted by the arbitrator's startling assertion that he even had "power to order retroactive pay for a period prior to the effective date of the contract." See 11 A.L. 600, at 604. This in itself would seem to disregard all known concepts of contract law.

Here the collective bargaining contract did not create a permanent status, give indefinite tenure or extend rights created under the contract beyond its life. No court or arbitrator may remake that contract or impose additional liabilities not contemplated by the parties. The award of the arbitrator went beyond the contemplation of the parties as reflected in the contract. The arbitrator obviously exceeded the powers and the scope of his authority and the court below did not err.

III. The Decision Of The Court Of Appeals Does Not Conflict With The Decision Of The N.L.R.B. In Local No. 611, International Chemical Workers, And The Sixth Circuit Decision In N.L.R.B. v. Knight Morley Corporation, On Which Such Board Ruling Was Based, Or With The Policies Of The Federal Labor Laws.

The Union suggests that there is conflict between the Fourth Circuit Court's decision in this case and the

decisions reached in *Local No. 611, International Chemical Workers*, 123 N.L.R.B. No. 182, CCH Labor Law Reporter, Par. 56, 319 (1959) and N.L.R.B. v. *Knight Morley Corp.*, 251 F.2d 753 (CA 6, 1958). In the *Chemical Workers* case, it was held that a union unlawfully refused to bargain, by insisting as a prerequisite to reaching agreement on a new contract, that the employer bargain concerning the discharge of two employees and seven strikers. The old contract provided for the arbitration of grievances. The report of the decision which we have studied is not clear as to whether the union sought to negotiate the grievance of the seven strikers outside of the framework of the contract before it expired but it is clear that as to the two employees discharged, the Union, both before and after the old contract expired, sought to avoid the grievance procedure of the contract. The Board held that under the decision of the Sixth Circuit in the *Knight Morley* case, the contractual grievance procedure was the channel for the collective bargaining duty as to grievances which arose under the contract. Since the employer was not obligated to bargain as to such grievance, it was an unfair labor practice for the union to insist on making the grievance part of the negotiations.

In *Knight Morley*, the Sixth Circuit had followed its own decision in *Timken Roller Bearing Co. v. N.L.R.B.*, 161 F.2d 949 (CCA 6, 1947) and held that an employer did not commit an unfair labor practice by insisting that a grievance concerning discharge, arising before a contract had expired, should be handled through the grievance procedure of the expired contract rather than as a part of the negotiations for a new contract. The Union, in the case at hand, now imagines that the decision of the Court of Appeals,

when considered in view of the decisions in the *Chemical Workers* and *Knight Morley* cases, impales the Union on the horns of a dilemma which the union propounds as follows: "If it asks the employer to discuss the discharges outside the grievance procedure, the employer is free to refuse. If the Union insists to the point of deadlock, it is guilty of an unfair labor practice. If it invokes the grievance and arbitration procedure, the employer can, under the decision in the present case, refuse with impunity to comply with an award ordering reinstatement of the employees." (Petitioner's Brief, 74).

We point out that the Union's dilemma is imaginary. First, it is not so that there is absolutely no way in which the employer's wrong can be undone. The employees' injury has been remedied to the full extent of their contract rights in that they have been allowed actual monetary loss up to the expiration date of the contract. They were not entitled to reinstatement. Second, the Union's interpretation of the premise upon which the *Chemical Workers* and *Knight Morley* cases are based is a mistaken one.

The true basis for the holding in the *Chemical Workers* and *Knight Morley* cases is a belief in and a desire to support the sanctity of the collective bargaining contract. In those cases it was not a question of the appropriate way to gain reinstatement. The Sixth Circuit and the N.L.R.B. cannot, by even the most vivid imagination, be said to have held that reinstatement can be allowed even if the agreement has expired. Instead, it was a question as to whether the procedures for handling disputes incorporated in a contract derived from the collective bargaining process were to be honored. As is stated in *Timken Roller Bearing Co.*

v. N.L.R.B., 161 F.2d 949 at 955 (CCA 6, 1947), the case upon which *Knight Morley* was based:

> "Though the duty to bargain is absolute, it may be channeled and directed by contractual agreement. N.L.R.B. v. Reed & Prince Mfg. Co., 1 Cir., 118 F.2d 874. There is here no restriction in the contract on the obligation of the petitioner to bargain as in N.L.R.B. v. Highland Shoe Co., 1 Cir., 119 F.2d 218, and the petitioner sought not to curtail the process but to utilize the contractual mechanisms for its prosecution. The law invites, though it may not compel, a collective bargaining agreement. If adjudication bases no sanctions on commitments made therein by the bargaining agent, it imparts futility to a bargaining process hopefully developing in the interest of industrial peace. If the law penalizes one party to the contract for standing on a bargain not itself violative of law, there may still be compulsion to bargain, but the virtue of agreement vanishes. *It may well be that industry will concede much for a no-strike convenant and orderly grievance procedures. It may also result that it will concede little for promises, the performance of which may be insisted upon only at the risk of condemnation for unfair labor practices. The law, we think, does not compel such result.*" (Italics ours).

It will be seen that in the *Timken* and *Knight Morley* cases, the duty to collective bargain had been directed through a contractual agreement and the court was there concerned with the effect on future efforts at collective bargaining if the contract should be ignored. The sanctity of that contract was, therefore, protected in order to give substance to the collective bargaining process.

In this case the Court of Appeals has also sought to protect the contract rights of the parties by refusing to extend the employment contract beyond its stated term. There is no conflict between decisions. Even *Lincoln Mills*, which is heavily relied on by the union, is predicated on imparting validity to the collective bargaining contract by implementing the policy of Congress "which placed sanctions behind agreements to arbitrate grievance disputes ***." See *Textile Workers v. Lincoln Mills*, 353 U.S. 448 at 456 (1957).

The Union further maintains that the decision might impede the operation of grievance and arbitration procedures under collective bargaining agreements by making it "advantageous for an employer to delay the settlement of grievances as long as possible, in the hope that by the time they reached arbitration the existing agreement will have expired and awards favorable to the union would not be enforceable." (Petitioner's Brief, 75).

This, of course, is a fallacy. It overlooks the fact that the grievants were granted their full contract rights when they were awarded back pay to the termination date of the contract. The Union conveniently forgets that the valid portion of the award will be enforced. In this case the Company is bound to pay several thousand dollars in back wages up until the time of the expiration date of the contract. Surely no employer is going to deliberately postpone settlement of just grievances until the contract has expired, while facing the possibility that thousands of dollars in damages are accruing against him during the period that the contract is still effective. If there is any danger at all that the claim is a valid one, the employer will by this economic pressure alone desire to dispose of the dispute as rapidly as possible.

The Union suggests that the possibilities it fears are illustrated by this case. It says that the only thing standing in the way of an agreement between the Company and the Union is the dispute of the eleven grievants involved here. There is nothing in the record which indicates the position of the Company, or the Union for that matter, on various terms of a new contract between the parties. There are many points of disagreement that would certainly hinder the formulation of a contract. Then, too, even without a contract, no great calamity has befallen those who have continued to work peacefully at higher wages than they had under the contract. (Ent.R. 2a-36.) And it might be remembered in this connection that the "no strike" agreement which the Union now feels is so essential to protection of the Company and the public did not prevent the original walkout for which the arbitrator himself meted out discipline to the participating employees. We suggest that much of the Union's alarm as to the national policy is engendered by the expediency of winning the case at hand.

The Union is advancing a theory of total judicial abnegation. It ignores that Section 301 of the Labor Relations Act, upon which the action in this case is based, was devised specifically to aid in giving a federal forum for suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting interstate commerce. The Court, in the instant case, has accorded the Union the full benefit of its contract and the Union and the eleven discharged men which it represents, cannot have more. The Union entered into a contract of one year's duration without provision for renewal. If greater and enlarged rights were desired they

should have been contracted for. As the Court of Appeals in its opinion has so clearly pointed out:

> "* * * Furthermore, the whole matter is subject to regulation by agreement between the parties which may provide for the continuation of the same contract terms in subsequent labor agreements curtailing the common-law right of the employer to discharge employees without cause. * * *" (Ent.R. 47).

This language adequately demonstrates that we are dealing only with rights under a particular contract and that the question presented is limited to this case. In the future it would be a simple matter to provide that the grievance provisions of the old contract would continue in effect while negotiations for a new contract are had.

Most collective bargaining contracts either provide for automatic renewal or else a new contract is negotiated prior to the expiration of the old. Here the Union failed to obtain a new contract either before or after the termination of the old one. And it asks that rights and privileges be granted just as if the old agreement had not been terminated or as if a similar new contract had come into existence. If the Union allows a contract to be terminated or does not provide for a contract of longer duration, or fails to provide for contingencies that might arise, it cannot complain that federal policy favoring arbitration is thwarted just because the contract has expired. To now ask that the contract be re-made actually runs counter to the free collective bargaining process of which the Union is such a staunch advocate.

IV. The Reasoning Of The Court Of Appeals Is Not Inconsistent With The Decision Of This Court In Vitarelli v. Seaton.

The Union maintains that the decision of the court in this case conflicts with the decision of the Supreme Court of the United States in *Vitarelli v. Seaton, Secretary of the Interior*, 359 U.S. 535, 79 S. Ct. 968 (1959). (Petitioner's Brief, 81). However, that case is not remotely similar to the instant case on the facts, does not involve a contract, and is permeated with policy considerations regarding procedural rights in security investigations within the administrative department of the national government.

The Union would interpret the result obtained in *Vitarelli* as enunciating a principle of general applicability to all employment to the effect that "when an employee is unlawfully discharged, the appropriate remedy is reinstatement with full back pay, even though his employer could subsequently have discharged him legally, so long as the employer in fact did not discharge him legally." (Petitioner's Brief 83). This is certainly an incorrect over-generalization and the case makes no such holding.

The rights of Vitarelli to reinstatement did not grow out of contract. His was a right established by federal administrative procedure. He was not protected in his tenure by an employment contract or by statute but he was protected by a departmental order of the Secretary of the Interior promulgating administrative rules and regulations prohibiting the discharge of an employee for security reasons unless certain prescribed procedures were observed involving specifi-

cation of charges, hearing, limitations as to competency and relevancy of evidence, and right to cross-examination.

Before the *Vitarelli* case was decided, it was well established that if dismissal from federal employment is based on a definite administrative procedure, even though generous beyond the requirements that bind such agency, that procedure must be scrupulously observed and followed. See *Service v. Dulles*, 354 U.S. 363, 77 S. Ct. 1152 (1957). If an attempt is made to discharge a governmental employee in violation of the rules of the administrative department in which he works, such discharge is without effect and his employment continues. Therefore, while the Secretary of the Interior had the right to summarily discharge Vitarelli without reason or cause, he could not do so once he had assigned the reason that national security was threatened by Vitarelli's continued employment. After security reasons were assigned for discharge, termination could be effectuated only after strict compliance with the rules and procedural standards promulgated by the Department of the Interior.

Nevertheless, the department failed to abide by its own rules and standards and Vitarelli's dismissal was of no effect because the charges were not specific, rules relating to relevancy and incompetency were not followed at the hearing, and right to cross-examine was refused. This is a far cry from the instant case where the rights of the eleven discharged men were established for only one year by a collective bargaining contract which was not renewed. In Vitarelli's case, his rights continued until lawfully terminated by the Secretary. They were not created or circumscribed by contract. They could only be terminated by the Secre-

tary and since he had not exercised his summary right to terminate, the employment continued.

Here in our case, the rights were created by the employment contract and ended when it terminated. The Supreme Court, in Vitarelli's case, was not dealing with employment rights created and governed by a collective bargaining contract nor did it purport to do so. It was not concerned with the principle that a collective bargaining contract does "not create a permanent status or condition, or give an indefinite tenure, or extend rights created and arising under the contract beyond its life, but that these rights remain in force only for the life of the contract unless renewed by subsequent contract or preserved by statute."

There is no conflict in decisions; nor is the reasoning of the Fourth Circuit inconsistent with *Vitarelli*. Here the rights were created and limited by contract. In *Vitarelli's* case, the right, or as it may better be called, the privilege, was preserved and guaranteed by established federal administrative law.

It is obvious that the Supreme Court was not attempting to formulate law as to private collective bargaining employment contracts. Its problem was one of a grave, recurring nature involving a continuing concern for the protection of individual rights and reputations in the loyalty and national security investigation field. Rather serious charges as to Vitarelli's loyalty were impugned and the hearing allotted him in some aspects approached that of an inquisition without the benefit of cross-examination. In the words of Justice Harlan, speaking for the majority at 359 U.S. 535, 542, 543:

> "* * * these indispensable indicia of a meaningful hearing were not observed. It is not an overcharacterization to say that as the hearing proceeded it developed into a wide-ranging inquisition into this man's educational, social, and political beliefs, encompassing even a question as to whether he was 'a religious man'."

As was said by Vitarelli himself, the action of the Secretary fastened a "badge of infamy" upon him which could only be removed by reinstatement.

If the court had permitted Vitarelli's discharge to have been upheld on the basis that the Secretary of the Interior could have, in any event, discharged him summarily without reason at any time even though he did not do so, the result would have been to completely undermine the established principle that administrative officers are bound by the procedures they themselves promulgate. Thus, in any loyalty or security cases where the employment was not protected by contract or statute, the administrator could label the employee a security risk, discharge him, deny a hearing provided for by departmental regulations, and then when the employee complained, say, "So what! I have the right to summarily discharge you in any event."

In such a situation the administrative rules and regulations would be circumvented with impunity, the employee being forced under a cloud of suspicion without the right to defend himself under rules intended to afford administrative procedural fair play. It is clear that the *Vitarelli* case has a limited application to its own peculiar factual circumstances and was not intended to pronounce law for general application to

private collective bargaining contracts. The decision there certainly is not in conflict with the decision in the case at bar.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the Court of Appeals for the Fourth Circuit should be affirmed.

Respectfully submitted,

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